United States Court of Appeals

NINTH CIRCUIT.

No. 13079

CIVIL.

RAY P. KOENIG,

Appellant,

vs.

DONALD CORCORAN

Appellee.

Appeal from the United States District
for the District of Montana,
Helena Division.

APPELLEE'S BRIEF

H. B. Landon,
Bozeman, Montana,
Attorney for Appellee.

INDEX

TABLE OF CASES

United States Court of Appeals

NINTH CIRCUIT.

No. 13079

CIVIL.

RAY P. KOENIG,

vs.

DONALD CORCORAN,

Appellee.

Appellee's Brief

STATEMENT

Appellant has pretended to make a brief summary of the evidence, but we feel that the said so-called summary is nothing but a fragile attempt to breathe strength into a few inferences, based upon inferences, based upon circumstances which have no probative value upon the issues involved. We are therefore constrained to analyze the evidence of all of the witnesses in so far as it has any bearing upon Plaintiff's prima facie case.

The Transcript contains the testimony of only three witnesses, aside from the testimony of the Plaintiff himself, and the Defendant who was called to testify by the Plaintiff; all three witnesses either worked or were hangers-on at "a tavern" located outside of the city of

Bemedji, Minnesota. The first of the witnesses is C. H. Strowbridge, who testified that he was the owner of the tavern and had his residence within one hundred feet from said tavern (See Tr. p 18); the testimony of Strowbridge is that said Eunice (Koenig) Corcoran was living separate and apart from the Plaintiff (Ray Koenig) for several months before the Defendant could have known the identity of said Eunice Corcoran (See Tr. p. 26):

"Q. I believe you testified that Eunice Koenig was living at your place in the fall of 1947? A. Yes. Q. When did she come there? A. She came there in the month of July, 1947. Q. And stayed in your home? A. That's right. Q. For how long? A. Well, she come there and made that her home until she left the next June, sometime in July, I believe she left there then. Q. In 1948? A. Yes. Q. The subsequent year? A. Yes. Q. Did she have a child with her? A. Yes. Q. Did the child make his home at your residence during that time? A. That's right. Q. And that was her home during that period? A. That's right. Q. Ray wasn't living there during that time I don't suppose? A. No. Q. Where was he living? A. Brainerd."

It was also significant that when pressed upon cross examination about whether said Eunice Koenig had been out with said Defendant in the fall of 1947, said Strowbridge testified as follows: (Tr. p. 31)

"Q. Actually you have seen her out with a number of different men, have you not, during the fall and winter of 1947-1948; Is that not true? A. I have seen her out with one man in the fall of 1947 because I was with him. Q. His name, as you have mentioned, is Russell McKenzie? A. Russell McKenzie, that's right. Q. Is that the *only man you have seen her with in the fall of 1947?* A. *That's the only one I can really say had her out.*" (Italics ours)

The next witness is Robert Hiltz, who testified that he had been in and about the tavern of said Strowbridge in 1947 and 1948; On cross examination he was asked and gave answers as follows:

(Tr. p 38)

"Q. I believe you testified you saw Eunice (Koenig) in 1948? A. That's right. Q. Did you see her in 1947? A. That's right. Q. But you never went anywhere except to the Dutch Tavern, I believe you said? A. That's about all. I went to shows and around town, certainly, but as far as night clubs, no. Q. You have seen Eunice in the night club, the Dutchess, in 1948? A. That's right. Q. What was she doing? A. Well, I suppose the same as anybody." . . .

(Tr. p 39)

Q. Of course, I am referring now to Eunice, what was she doing in there when you saw her there? Was she drinking beer? A. That's right. Q. Was she drinking hard liquor? A. Can't say, I didn't keep an eye on her that close. . . . Q. Does that refer to Eunice, too, you didn't pay much attention to what she was doing? A. That's right. Q. Well, then do you know what she was doing in the Dutch Tavern when you saw her in there? A. I've seen her around once in a while, a guy can't help seeing what's going on once in a while, can he? . . .

(Tr. p 40)

Q. Do you know whether on any of these occasions that you saw her there she had a *date* with anybody? A. *No, I cannot.* Q. All you know is that you saw her there, is that it? A. Yes, I have saw her there."

(Italics ours)

The other witness is Roland F. Suckert, who testified that in 1948 he was eighteen years old, and did not know the Defendant, Donald Corcoran, until the latter part of

February, 1948. The only testimony offered by said Suckert which apparently is what is relied upon by the Plaintiff to establish a prima facie case was the testimony which is set forth on page 43 of the transcript, as follows:

> "Q. Well, when you came in, who did you find there? A. I found Eunice and Corcoran. Q. What were they doing? A. Well, they were just laying on the bed. Q. The bed or davenette? A. I would say both places. Q. You say you saw them on the bed; was that upstairs or downstairs? A. Downstairs. Q. And what were they doing, what did they say to you or what did you say to them? A. I asked them what they was doing, and they said, "You go upstairs and sleep" . . . .

The testimony fixes no particular day, or even month, when it might have occurred, if it did occur, although admittedly it had to be after the latter part of February, 1948, to be consistent with the former testimony of Suckert, when he testified that he never met Corcoran until the latter part of February, 1948. (See Tr., p 41)

When this witness was asked whether they were lying on the bed or davenette, he testified, "I would say both places" (See Tr. p 43). This does not explain whether one was lying on the davenette and the other on the bed, or whether they were jumping from the bed to the davenette, nor what their conduct was supposed to have been. When counsel asked the witness what they were doing, the witness did not answer that they were doing anything.

The foregoing is substantially the testimony of all of the three witnesses who testified on behalf of the Plaintiff. The only other witness aside from the Defendant, is the Plaintiff himself, and the Plaintiff does not pretend to any personal knowledge concerning the conduct of the

defendant at any time and relies exclusively upon the testimony of the three witnesses last mentioned, to make out his entire case.

ARGUMENT

It is to be noted that Plaintiff in his original complaint made no claim or assertion that defendant had known the wife of the Plaintiff carnally and that it was only after counsel for Plaintiff found that the Court was about to grant a motion to dismiss the Complaint for lack of evidence that they moved to amend the Complaint to take advantage of whatever inferences could be drawn from the testimony of Roland F. Suckert, *supra* (Tr. p 80). However, both the evidence and pleadings fall far short of whatever is required to prove adultery. In the case of Kenworthy vs. Richmond, 149 Pac. p 350 (Wash.) the Court said:

> "The first part of the instruction stated to the jury that: 'While the complaint in this action does not directly charge the defendant Richmond with having committed adultery with the wife of the plaintiff, yet if you find by a preponderance of the evidence that the defendant Richmond and the wife of the plaintiff occupied a room in the Palace Hotel together, you may consider that fact in determining whether the defendant Richmond is liable in this case.' The jury no doubt understood from that statement that the complaint did state that Richmond and the Plaintiff's wife had committed the crime of adultery, and that if they so found, then it followed that Richmond was liable. We think this is clearly erroneous, first, because the complaint does not charge adultery; and second, because the evidence was entirely insufficient to be submitted to the jury upon that question. The Court should therefore

have instructed the jury as requested by the defendants upon the question of adultery, and should not have given the instruction which was given. We have no doubt that this instruction was prejudicial, and that the jury based the verdict largely, if not wholly, upon it. The judgment is therefore reversed, and the cause remanded."

and quoting Bishop, in Marriage, Divorce & Separation, Vol. 2, Para 1325, we quote:

"The act of adultery must be duly shown. The allegation should state positively, not from information and belief, or otherwise in uncertain terms, that, at a time and place specified, the defendant committed the carnal act with a person named; unless something of this particularity is unknown, when the want of knowledge may be averred as a substitute therefor."

The Plaintiff in his original complaint, and as amended, has charged (See Tr. p 3) as follows:

" II

That on the 8th day of March, 1942, plaintiff married Eunice Jantvold in Walker, County of Cass, Minnesota, and thereafter lived in the State of Minnesota up to and until July, 1947, *when plaintiff's wife left him* and went to the home of her parents in Bemidji, Minnesota, where she stayed with the exception of a day or two at a time when she would come back and stay with plaintiff, and *that this continued until Christmas, 1947 when plaintiff's wife advised him that she didn't love him and wanted a divorce;"* (Italics ours).

The Plaintiff also testified in accordance with said pleadings that on Christmas of 1947, his wife, EUNICE KOENIG, told him that she no longer loved him. (See Tr. p 48). According to the testimony this conversation

took place over five months after the Plaintiff's wife had already left him, and at a time when the defendant Corcoran had never even so much as had a speaking acquaintance with Plaintiff's wife.

In discussing the elements required to make out a case of alienation of affections, the following statement is set forth in 42 Corpus Juris Secundum, p 321:

> "669. DEFENDANT NOT PROCURING CAUSE. The defendant is liable if his wrongful acts were the controlling cause of the alienation of affections, although there were other contributing causes. In order to hold defendant liable, his wrongful acts or conduct must have been the *procuring or controlling cause* of the enticement or alienation; he is not liable if the acts complained of did not alienate the affections of plaintiff's spouse or cause the separation. The elements of the cause of action are defendant's wrongful conduct, plaintiff's loss of his or her spouse's affection or consortium, and the causal connection between such conduct and the loss." (Italics ours).

And in the case of Johnson v Linquist, 1929, 177 Minn. p. 270, 224 N.W. 839, the Court said:

> "In order to recover damages for the alienation of the affections of his wife, the husband must show that the defendant took an active and intentional part in causing the estrangement and the loss of the wife's affections; that he acted wrongfully and intentionally, it must appear that defendant's wrongful acts and intentional conduct were the controlling cause which led to the estrangement."

See also Bershire vs Harem, (Ore.) 178 Pac. 2nd, 133
Sharp vs Hayes (Del. Super) 50 A2 p 412

Waldron vs Waldron, 156 V.S. 361
39 L. Ed. 453

BURDEN OF PROOF

See 42 Corpus Juris Sec. p 332

"Plaintiff has the burden of proving all the essential elements of his cause of action . . .

In an action for enticement or alienation of the affections of a spouse, plaintiff has the burden of showing all the essential elements of his or her cause of action. In general, plaintiff has the burden of proving that the affections of the spouse were actually alienated from plaintiff by the wrongful acts or conduct of defendant, and that defendant had knowledge of the marital relationship . . ."

In commenting upon evidence sufficient to withstand a Motion for a directed verdict, the Court, in the case of Bravo vs Sharkey, (Cal.) 218 Pac. 2nd, p 788, stated:

"Defendant's second contention is likewise without merit. When the Supreme Court in Blumberg v M. & T. Incorporated, 34 Cal. 2nd—, 209 P 2d 1, 3, said 'A trial court is justified in granting a motion for non-suit . . . when, and only when, disregarding conflicting evidence and giving to Plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff', it meant that the evidence must be sufficient to raise something more than mere surmise or conjecture."

See Also 27 Am. Juris. p 125

The condition of this case does not involve, as appellant would like to pretend, any consideration of comparative

evidence, nor did the trial court pass upon the credibility of witnesses in its consideration of the Motion to dismiss.

In a statement of reasons for granting the Motion to dismiss, the Court said: (See Tr. p 89-90):

"In a case of this kind there are three main elements that have to be proved. These elements are that the Plaintiff has to prove the defendant's wrongful conduct, then he has to prove the alienation of the affections of his wife, and then he has to prove that the defendant's wrongful conduct caused the alienation of affections. Well, the proof here just didn't entitle a jury to believe that. The proof of the Plaintiff himself was that the wife's affections were at least alienated upon Christmas Eve, at least by that date, when she so announced to him they were alienated and she didn't love him any more and wanted a divorce. That was his proof. The proof with reference to the defendant up to that time is just practically that he had met the wife at that point. The proof is further he didn't know who she was at that time. There is no evidence from which the jury would find even that he knew she was a married woman, and the acts of the defendant that were proved were nothing from which I believe the jury would be warranted in finding that his acts were wrongful. Apparently he met her at a bar which she frequented, where she lived with the owner of the bar and worked there at times, helped out, and the defendant on occasions, at least prior to the time when her affections were proved by the plaintiff to have been alienated. You couldn't find from those facts that the defendant's acts alienated her affections. There is just a complete failure of proof, and in my opinion, I don't think the jury would be warranted in finding that there was such proof. The whole matter comes down to that general, simple proposition that the defendant's conduct was not such as to alienate her affections at that point.

It must be established in any event that his conduct was wrong, that his intention was to alienate her affections from the plaintiff, that that was his purpose, that he enticed her away from the plaintiff. Now, from all of the circumstances of the case, the jury just couldn't believe that. The whole marriage relationship, The whole course of the marriage and the actions of the Plaintiff are such that the jury would just be acting, if they acted in favor of the plaintiff, would be acting out of some generosity or some other matter other than pure facts of the case. As I say, you have to find not only that the plaintiff engaged, or that the defendant engaged in wrongful conduct, and not only find her affections were alienated, but you have to find that his conduct was the cause, or, at least a contributing cause of the alienation of the affections, and it just isn't in the evidence."

CONCLUSION

Appellee respectfully submits that the trial court would have abused its discretion if it had not granted the Motion to Dismiss, in that the evidence is totally lacking, either in the statement of any facts or any inferences which can be reasonably drawn from the evidence to indicate that the said Defendant in any way interfered with the Plaintiff and his wife, nor that he, the defendant, engaged in any conduct which could in any sense be considered as a *controlling or procuring* cause of the estrangement between the plaintiff and his wife, and that consequently the Order and Judgment of the Trial Court should be affirmed.

Respectfully submitted this 30th day of January, 1952.

H. B. Landoe,
Bozeman, Montana,
Attorney for Appellee.